

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 31, 1997

Mr. Phillip J. O'Brien
NEWMOA State Chair
129 Portland Street, Suite 601

Dear Mr. O'Brien,

Thank you for your letter of August 5, 1997 regarding implementation of the Mercury Containing and Rechargeable Battery Management Act (Battery Act). In your letter, you request clarification regarding the interpretation by EPA Region I that the Battery Act requires States seeking authorization for the federal Universal Waste rule to adopt provisions regarding the removal of electrolyte from batteries that are identical to those in the federal Universal Waste rule.

The Battery Act affects State battery regulatory programs in several ways. First, section 104(a) of the Battery Act implements the federal Universal Waste rule as the governing authority over the collection, storage, and transportation of batteries subject to the provisions of section 104, notwithstanding any State law. The effect of this provision is to preempt existing State regulations covering the collection, storage, and transportation of subject batteries. Section 104(b)(2) of the Battery Act also requires States who wish to regulate the collection, storage, and transportation of subject batteries to adopt provisions identical to the applicable provisions in the federal Universal Waste rule.

OSW communicated with Region I when the Region was conducting its regulatory analysis of draft State Universal Waste regulations, and has examined the Region's conclusions. We believe that EPA Region I's interpretation of the Battery Act regarding the regulation of battery electrolyte removal is consistent with the requirements of the Act. Although activities such as the removal of electrolyte from batteries would traditionally be considered a waste treatment activity that would require a handler to obtain a RCRA permit, the federal Universal Waste rule specifically allows this activity to be performed by universal waste handlers (such as entities that collect, store, or transport universal waste batteries). EPA interprets the Battery Act's applicability to collection, storage, and transportation of subject batteries to include activities regulated under the federal Universal Waste rule that are conducted in the course of collection, storage, and transportation. EPA also believes that this interpretation conforms to the intent of the Battery Act. Thus, the removal of electrolytes from batteries in the course of transportation, collection, or storage, is an activity covered under the Battery Act, and State regulations that are not identical to those in the federal Universal Waste rule are preempted. As a result, States seeking approval to implement the provisions of section 104 of the Battery Act may not impose

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additional requirements on the collection, storage, and transportation of subject batteries, including provisions related to electrolyte removal. Note that the requirement that the electrolyte be handled as a hazardous waste after removal does not affect this interpretation. Further, the Agency agrees with you that this activity should not present a significant waste management issue under the Act, since electrolyte removal is primarily an issue for lead-acid batteries. Batteries managed in accordance with 40 CFR Part 266 subpart G, or an authorized state program implementing such provisions, are excluded from the Act under section 104 (b)(2) of the Act. Although there may be batteries covered under the Act for which electrolyte removal is an issue, since information on this subject has not been presented to EPA, we do not believe that these batteries represent a significant universe.

I hope that this letter sufficiently clarifies EPA's approach to the implementation of the Battery Act and subsequent approval of States. I appreciate NEWMOA's efforts to facilitate the authorization of States for the Universal Waste rule. If you have further questions regarding the approval of States for the provisions of the Battery Act of the Universal Waste rule, please contact Wayne Roepe of my staff at 703-308-8630, or Dave Coursen of the Office of General counsel at 202-260-4554.

Sincerely,

Elizabeth A. Cotsworth
Acting Director
Office of Solid Waste

cc: Carole Ansheles, NEWMOA
Kevin McSweeney, EPA Region I

NORTHEAST WASTE MANAGEMENT OFFICIALS' ASSOCIATION

August 5, 1997

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Ms. Elizabeth Cotsworth, Acting Director
Office of Solid Waste (MS 5301W)
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401 M Street SW
Washington, DC 20460

Dear Ms. Cotsworth:

I am writing on behalf of the Northeast Waste Management Officials' Association (NEWMOA) to request guidance regarding implementation of Public Law 104-142, the Mercury-Containing and Rechargeable Battery Management Act ("Battery Act" or "Act"), especially in terms of how it interacts with the Universal Waste Rule ("UWR" 60 FR 25492). The NEWMOA States are in the process of developing and adopting state-specific rules for managing Universal Wastes, and one of NEWMOA's priorities has been to facilitate States' efforts to adopt and become authorized for the UWR in a timely manner. As part of that process, we have been evaluating the Battery Act in order to ensure consistency among our states and a smooth state authorization process, and to promote interstate consistency and cost-effective collection of Universal Wastes. We have found certain provisions of the Battery Act to be vague; in particular, the extent of the requirement that States' rules pertaining to batteries be identical to the federal UWR has proven problematic.

For instance, can a state prohibit the removal of electrolyte from regulated batteries (treatment of a hazardous waste) by parties which have not first obtained a state permit? Pursuant to both the UWR and the Battery Act, electrolyte drained from batteries is subject to the requirement of a hazardous waste determination and must be managed pursuant to RCRA Subtitle C or subtitle D accordingly (see 40 CFR 273.13(a)(3)(i) and (ii)).

In addition, the drained electrolyte would be subject to any more stringent and broader in scope provisions of state hazardous and/or solid waste management programs. More specifically, Sections 104(a) and (b) of the Battery Act discuss the “collection, storage, or transportation” of batteries covered by the Battery Act. These sections of the Battery Act are silent on disposal and treatment, and both EPA and the States have both historically regarded electrolyte removal from batteries as a form of hazardous waste treatment. Consequently, the NEWMOA States have interpreted the language to mean that for batteries covered by the Act., States may adopt non-identical provisions pertaining to disposal and treatment. However, EPA Region I/New England has interpreted it to mean that regardless of whether the activity is considered treatment, States must allow electrolyte removal by handlers (without a permit to treat hazardous waste) since the federal UWR handlers may conduct this activity without a permit. To date, two of our states (MA and VT) have already been advised by EPA Region I/New England that authorization will not be given for certain “state only” provisions pertaining to batteries due to conflicts with the Battery Act.

NEWMOA is concerned about the Region’s interpretation for two reasons. One, it seems to go beyond the intent of the Battery Act, particularly in terms of the extent to which state authority is preempted, which may also adversely affect the UWR authorization process. Two, the batteries for which electrolyte removal is most often an issue are the lead-acid batteries specifically excluded from the Act. Clarification in the form of guidance from EPA Headquarters on these points, and specifically regarding the rationale for allowing the removal of battery electrolyte, would be very helpful to the States.

Thank you for your attention and timely response to this matter.

Sincerely,

Philip J. O’Brien, Ph.D.
NEWMOA State Chair and
Director, Waste Management
Division, New Hampshire
Department of Environmental
Services

cc: NEWMOA Directors

K. McSweeney, Assoc, Dir., Ecosystem Protection Ofc., EPA Region 1/New
England J. Filippelli, Chief, RCRA Programs Branch, EPA Region 2
Bill Cass and Carole Ansheles, NEWMOA